Supreme Court U. S.
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No. 220.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

CLARENCE HUDDY, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

LOUIS D. BRANDEIS,
EZRA R. THAYER,
EDWARD F. MCCLENNEN,
Counsel for Plaintiff.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 480.

CLARENCE MURPHY, PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error, a citizen of the United States, was, on May 29, 1896, sentenced by the Superior Court of Massachusetts to a period of imprisonment in the State prison of not less than ten nor more than fifteen years, one day thereof to be in solitary confinement and the residue at hard labor. This sentence followed upon the plaintiff's conviction for embezzlement by reason of acts done by him in 1893, and was imposed under a statute which took effect on Jan. 1, 1896, and contained the following provisions:

> "SECTION 1. When a convict is sentenced to the State prison, otherwise than for life, or as an habitual criminal, the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict may be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offence of which he is convicted, and the minimum term shall not be less than two and one-half years."
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> Mass. St. 1895, Chap. 504.

Wall 38] to raise the question of the right of the court to inflict a new and larger punishment on the prisoner, without reference to the time of his imprisonment on the one set aside, that point was not presented so as to receive the attention of the court, and certainly was not considered or decided." . . .

"The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session at the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest." . . .

"The petitioner, then, having paid into court the fine imposed upon him of two hundred dollars, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States, and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and, without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him *twice* for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing." 18 Wall. 167, 168, 175.

It will be observed that this decision was rendered in spite of the fact pointed out in the dissenting opinion (pp. 199–200) that the order vacating the former sentence rendered the imposition of the fine a nullity and entitled the prisoner to its return.

Ex parte Lange has been repeatedly approved by this court. So in United States *v.* Chouteau, 102 U.S. 603, 611, 612, the Court said:

"As it was justly said by this Court in *ex parte* Lange, speaking through Mr. Justice Miller, 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same Court, on the same facts, for the same statutory offence. The principle finds expression in more than one form in the maxims of the common law.' 18 Wall. 163, 168."

So in *in re* Snow, 120 U.S. 274, the Court held that the crime of unlawful cohabitation under the Act of Congress of 1882 for the suppression of polygamy in Utah, was a continuous crime, that the prisoner could therefore be sentenced for only one conviction during the period covered by the indictment, and that the attempt to impose a second sentence for separate acts was to put the prisoner twice in jeopardy and entitled him to his relief on *habeas corpus*. This was approved and reaffirmed in Hans Nielsen, petitioner, 131 U.S. 176.

The same conclusion has repeatedly been reached by State Courts of authority. In State *v.* Addy, 43 N.J. Law, 113, the defendant was convicted of maintaining a nuisance by obstructing a water-course. The Court suspended sentence on the defendant's payment of costs provided that he kept the water-course clear in the future. Subsequently the Court undertook to sentence him for the offence. It was held that such imprisonment was unlawful, and that although the Court had power in a proper case to suspend sentence, yet where the Court had required as a condition what it could only impose by sentence, it had in

effect already punished the defendant once, and could therefore impose no further sentence.

In State *v.* Warren, 92 N.C. 825, it was held that where, after a single day's confinement under a sentence to imprisonment, the sentence was remitted, and an order made and complied with that the defendant pay the costs and give security for his good behavior, a later sentence for the same offence was unlawful.

In Com. *v.* Loud, 3 Met. 328, service of a sentence passed on a complaint so defective that the Court was without jurisdiction was held a bar to a subsequent sentence.

In Feeley's case, 12 Cush. 598, a second sentence was held unlawful on facts almost identical with those of *ex parte* Lange.

In Brown *v.* Rice, 57 Me. 55, the prisoner was sentenced to a term of imprisonment, and within nineteen days the Court undertook to revoke the sentence and re-sentence him to a longer term. This sentence was held unlawful, and the Court said:

> "If these proceedings were legal, it would seem that this prisoner must suffer punishment under two distinct sentences for the same offence. If the judge could annul the first sentence as to its legality afterwards, he could not annul or restore the nineteen days of imprisonment suffered under it. If now he is to be sent to the State prison for three years more, not counting his time in jail under the first sentence, he certainly must suffer two distinct imprisonments under two distinct sentences, given at a considerable interval of time, for the same offence, and under one indictment." 57 Maine, 58.

The same decision was made by the Supreme Court of Michigan in People *v.* Meservey, 76 Mich. 223, and People *v.* Kelley, 79 Mich. 320: and by the Supreme Court of Oregon in State *v.* Cannon, 11 Ore. 312. These views are approved in Shepherd *v.* the People, 25 N.Y. 406.

So in *in re* Jones, 35 Neb. 444, the Court sentenced the defendant to an industrial school on the ground that he was under

eighteen years of age. Thereupon, after an interval of less than three weeks, having ascertained that he was in fact over eighteen, he was recalled by the Court and sentenced to the Penitentiary. It was held that the new sentence was unlawful and that the prisoner was entitled to his release.

That these decisions proceed upon the ground that the defendant has been put twice in jeopardy not only appears from the recognized power of the Court to revoke a sentence and impose a new one before any part of the first sentence has been executed (Commonwealth *v.* Weymouth, 2 All. 144), but was, moreover, expressly recognized by the Courts as the ground of the decision:

> "There must be restraint upon judicial authority over judgments rendered during the term, in such cases, or the fundamental maxim *nemo debet bis puniri pro uno delicto* would be violated. Let us suppose a judgment for corporal punishment, such as formerly might here be rendered, and its prompt and full execution during a term, can the sentence be set aside and all done under it annulled? The stripes upon the person or the painful pressure of the stocks or pillory with their attending humiliation could not be effaced." State *v.* Warren, 92 N.C. 825, 827, 828.

> "If the Court had formally adjudged that the defendant should abate the nuisance and pay the costs, it would have been unexceptionable. It should seem, therefore, *a fortiori*, that where the Court has made an order tantamount to such legal judgment and the defendant has complied with it, a mere informality ought not to justify the State in claiming a second sentence. The citizen cannot be put twice in jeopardy. By submitting to the demands of the Court, he pays the penalty of his offence once for all, and the power of the State to punish him is exhausted." State *v.* Addy, 43 N.J. L. 113, 117.

> "The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offence.

> The fundamental law of the State, as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act." *In re* Jones, 35 Neb. 499, 502.

These conclusions in no way conflict with *in re* Bonner, 151 U.S. 242. The only error in the sentence in that case was the commitment of the prisoner to the wrong institution. This Court expressed the view that the Court which imposed the sentence might remove the erroneous feature of the sentence and commit the prisoner to the right institution, and pointed out the general power of the Court to correct erroneous sentences. The opinion lends no color, however, to the proposition that the Court can impose a new sentence as distinguished from correcting the old one, but on the contrary expressly recognizes that where the attempt goes beyond such a correction of an erroneous sentence, the power of the Court ceases.

> "Where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the Court that imposed the sentence in order that its defect may be corrected. . . . He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that Court for correction in that particular. . . . But in a vast majority of cases the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be whilst relieved from any excess committed by the Court of which he complains. In such case the original Court would only set aside what it had no authority to do and substitute directions required by the law to be done upon the conviction of the offender." 151 U.S. 259, 260.

That the Court was careful to guard against too broad an application of these views appears again from the following passage:

> "In some cases, it is true, no correction can be made of the judgment, as where the Court had under the law no jurisdiction of the case; that is, no right to take cognizance of the offence alleged, and the prisoner must then be entirely discharged; but those cases are rare." 151 U.S. 262.

The distinction is again carefully taken in United States *v.* Pridgeon, 153 U.S. 48, 62.

> "The sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the Court over the person and offence, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence."

The facts in the present case clearly bring it within these exceptions, and within the decision in *ex parte* Lange.

II.

THE PLAINTIFF IN ERROR HAS RECEIVED A NEW SENTENCE OF THE KIND REFERRED TO ABOVE.

A. *The second sentence was a new sentence, and not a correction of the old.*

This appears upon the face of the sentence. The former sentence was not for any term of imprisonment, but on the contrary was imposed under an act expressly providing that the "court imposing the sentence shall not fix the term of imprisonment;" in other words, that the Court should commit the defendant to prison during an indeterminate period, subject to the control of certain specified persons (see p. 12 below). The new sentence for a fixed term could not be in its nature, and did not even purport to be, a correction of the old, but was essentially a different thing.

The point is moreover put beyond discussion by the fact that the new sentence contained a provision for solitary confinement. Under the decisions of the Supreme Judicial Court of Massachusetts this feature necessarily made the sentence a new one, distinct from the old.

> "The Court are of opinion that that provision applies to an original sentence only, and not to a sentence for additional punishment."

Bump *v.* Commonwealth, 8 Met. 553, 554.

B. *The second sentence was for a longer period than the first.*

This appears from a comparison of the following statutes, the first of which applies only to indeterminate sentences, and the second only to sentences for a fixed term:

> "Any convict, sentenced as aforesaid, whose record of conduct shows that he has faithfully observed all the rules of said prison, and has not been subjected to punishment, shall be entitled to release from said prison upon the expiration of the minimum term of his sentence; and he shall then be given a permit to be at liberty therefrom during the unexpired portion of the maximum term of his sentence. Said permit shall be issued by the commissioners of prisons upon such terms and conditions as they shall establish." . . .
>
> (Mass. Stat. 1898, Chap. 371.)

> "Every officer in charge of a prison or other place of confinement shall keep a record of the conduct of each prisoner in his custody whose term of imprisonment is not less than four months. Each such prisoner whose record of conduct shows that he has faithfully observed all the rules, and has not been subjected to punishment, shall be entitled to a deduction from the term of his imprisonment, to be estimated as follows: upon a sentence of not less than four months and less than one year, one day for each month; upon a sentence of not less than one year and less

> than three years, three days for each month; upon a sentence of not less than three years and less than five years, four days for each month; upon a sentence of not less than five years and less than ten years, five days for each month; upon a sentence of ten years or more, six days for each month. . . . Each prisoner who is entitled to a deduction from the term of his imprisonment, as aforesaid, shall receive a written permit to be at liberty during the time thus deducted, upon such terms as the board granting the same shall fix. . . .
>
> (Mass. Pub. Stat., Chap. 222, Sect. 20.)

Under his former sentence the prisoner could thus have gained his liberty upon May 29, 1906, whereas, under the present sentence, even if he receives the maximum deduction, he cannot be released before July 3, 1907.

Not merely has the period of imprisonment been thus increased by more than a year, but it has also been extended in other ways. The theory of the judge imposing the second sentence was apparently that the original sentence of not less than ten years nor more than fifteen years was equivalent to a term of imprisonment for twelve and one-half years, and that sentence should therefore be imposed for that period less the time during which the plaintiff in error had been actually imprisoned. Even if the correctness of this theory be conceded, it should be observed that under the new sentence the prisoner not only is deprived of any right to the deductions to which he would have been entitled by good conduct during the long period (almost three years) of his previous actual imprisonment, but the deductions which he can hereafter receive are reckoned upon a term of less than ten years and can therefore in no event exceed five days in each month, whereas upon a sentence for more than ten years (corresponding with the actual period of his detention in prison) he might have earned six days per month.

The prisoner has thus received a new sentence substantially longer than his original sentence. This fact was not overlooked by the Supreme Judicial Court of Massachusetts, which distinctly says (Record, 9):

> "Whether the confinement under the reversed sentence has been longer or shorter can on principle make no difference."

If sentence can be increased in this manner, after its partial execution, there is no limit to the power of the Court short of the maximum term allowed by the statute regardless of the period served. The astonishing result thus necessarily follows that if the very defendants in Commonwealth *v.* Crowley and Commonwealth *v.* Brown had been sentenced to imprisonment for the maximum term, and had served all but a trifling part of their original sentence, which sentence was held valid by the Supreme Judicial Court when their exceptions were overruled, that Court would nevertheless now have the power to impose upon them a new sentence for the same maximum term without any allowance for their actual confinement in the State prison.

It is submitted that the mere statement of such a result is a sufficient answer to the position taken by the Commonwealth.

C. *The new sentence is altogether different in its nature from the old.*

The Statute of 1895 expressly provides that the Court shall not fix a term of imprisonment, but shall simply establish a maximum and a minimum during the interval between which the prisoner is held substantially at the pleasure of the prison commissioners subject to the approval of the governor and council. There is no limit to this interval except the maximum term fixed by law for the punishment of the offence on the one hand, and a minimum of two and one-half years upon the other. The indeterminate period may thus be much the largest part of the sentence. During this

whole period he is kept in suspense as to the time of his relief, and the question depends upon the favor of persons to whom he can have little or no personal access to see that his case has proper consideration. With many prisoners these circumstances might cause such distress of mind as would be in itself a serious additional punishment. The observations of the Court in Medley, Petitioner, 134 U.S. 160, 172, as to a much more limited period of uncertainty in the case of prisoners condemned to death, is applicable.

> "Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the Penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offence was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment."

In People *v.* Cummings, 88 Mich. 249, such weight was given to these grounds in considering an indeterminate sentence act similar to the Massachusetts statute of 1895, that the Court held the entire act unconstitutional as granting an arbitrary power to the prison commissioners, and substantially establishing a cruel and unusual punishment.

D. *The prisoner has served in full one of the penalties imposed by the earlier sentence.*

The sentence of solitary confinement was imposed under the following statute:

"When the punishment of imprisonment in the State prison is awarded against a convict, the form of the sentence shall be that he be punished by confinement at hard labor, and he shall also be sentenced to solitary imprisonment for such term as the Court shall direct, not exceeding twenty days at one time; and in the execution of such sentence, the solitary imprisonment shall precede the punishment by hard labor, unless the Court otherwise orders; but in case of severe illness of the convict, the warden, upon the certificate of the physician of the prison, may postpone the solitary imprisonment until the health of the convict is so far restored that his life will not be endangered by such solitary imprisonment."

(Pub. Stat., Chap. 215, Sect. 23.)

As to the stringent character of solitary confinement in Massachusetts, see Pub. Stat., Chap. 221, Sect. 29; Chap. 222, Sect. 3.

These statutes were fully considered and construed in Stevens *v.* Commonwealth, 4 Met. 360, and it was held that the sentence of solitary confinement must be for a part of the time comprised in the original sentence, but that within the limits of that sentence the term of solitary confinement was not limited except by the provision of the statute that solitary confinement must not exceed twenty days at one time.

The gravity of this part of the sentence is not a matter open to discussion since the decision in Medley, Petitioner, 134 U.S. 160, 171. In that case this Court, after a full and luminous examination of the history of solitary confinement, pointed out with clearness and emphasis that it constituted "an additional punishment of the most important and painful character."

This portion of the original sentence was unquestionably valid. It has been served in full, and no order of the Court can restore the plaintiff in error to his former position in respect to it. As was said in Brown *v.* Rice, 57 Maine, 55, 58, "If the judge could annul the first sentence as to its legality afterwards, he could not annul or restore the nineteen days of imprisonment

suffered under it." Its effect on the prisoner can no more be removed than "the stripes upon the person or the painful pressure of the stocks or pillory with their attending humiliation" can be "effaced." (State *v.* Warren, 92 N.C. 825, 828.)

The circumstance that the solitary confinement in this particular case was in fact short, and that the judge imposing the second sentence felt the hardship and was willing, although unable, to avoid it, were mere accidents not affecting the constitutional rights of the plaintiff in error.

It is therefore submitted that the full execution by the prisoner of a serious and valid portion of the original sentence brings him directly within the decision in *ex parte* Lange.

E. *The original sentence was valid under the law of Massachusetts as it then existed.*

Among several prisoners sentenced at about the same time with the plaintiff in error under the indeterminate sentence law for acts committed before its passage, two carried the point to the Supreme Judicial Court, and in both cases that court held that the statute was intended to apply to them, and was valid.

> Commonwealth *v.* Brown, 167 Mass. 144.
> Commonwealth *v.* Crowley, 168 Mass. 121.

These decisions actually settled the law of the Commonwealth at the time they were rendered. Not only was the plaintiff in error justified in relying upon them, but for all practical purposes *they were law* until the decision in Murphy *v.* Commonwealth, 172 Mass. 264.

This was directly decided by the Court of Appeals of New York with reference to the period between Hepburn *v.* Griswold, 8 Wall, 603, and the reversal of that decision in the Legal Tender Cases, 12 Wall, 457.

> "The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was as

applied to the relations between these parties, and to this case the law and not mere evidence of the law."

Harris *v.* Jex, 55 N.Y. 421, 424.

For the purpose of determining what is the law of a particular jurisdiction at any given time, no other test than the decisions for the time being of the court of last resort in that jurisdiction could work justice to the citizen, at least in a question of constitutional rights and personal liberty. In another class of cases it has been held by this Court that property rights fixed by decisions of the highest court of a State could not be affected by later decisions overruling them. (Gelpcke *v.* Dubuque, 1 Wall. 175.) And this applies *a fortiori* to rights of personal liberty. Actual imprisonment inflicted by the officers of a State in accordance with the law as declared by its highest court cannot by any fiction, or by any later modification of the views of that court, be disregarded or treated as a nullity.

The suggestion that the decisions in Commonwealth *v.* Brown, 167 Mass. 144, and Commonwealth *v.* Crowley, 168 Mass. 121, were in violation of the United States Constitution, and therefore could not be law, cannot affect this conclusion. Even if that point had been actually decided in Murphy *v.* Commonwealth, 172 Mass. 264, (which was not the fact, the real decision being upon the construction of the statute with reference to crimes committed before it became a law,) the imprisonment actually suffered by the plaintiff under the law as laid down and enforced by the highest court of the Commonwealth was none the less real; and the fact that the officers of the Commonwealth were acting in violation of the Constitution of the United States could not put them in a better position than they would otherwise have occupied.

The opinion of the Supreme Judicial Court of Massachusetts not only disregards these considerations but overlooks the dis-

tinction between correcting an invalid sentence by removing its excess or relieving against its erroneous features, and imposing a new sentence. It is respectfully submitted that not only is this an error, but that the suggestions of the Court that the time during which the prisoner has been actually in confinement can be disregarded, and that his assertion of constitutional rights can be deemed a waiver of other constitutional rights, are fictions which should not be recognized in a question of the right to personal liberty.

SECOND.

The prisoner's rights under the Constitution of the United States have been infringed.

I.

THE RIGHT NOT TO BE PUT IN DOUBLE JEOPARDY IS A PRIVILEGE AND IMMUNITY OF A CITIZEN OF THE UNITED STATES.

In O'Neil *v.* Vermont, 144 U.S. 323, 361, Mr. Justice Field said:

> "What are the privileges and immunities of citizens of the United States which are thus protected? These terms are not idle words to be treated as meaningless, and the inhibition of their abridgement as ineffectual for any purpose, as some would seem to think. They are of momentous import, and the inhibition is a great guaranty to the citizens of the United States of those privileges and immunities against any possible State invasion. It may be difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States, but after much reflection I think the definition given at one time before this court by a distinguished advocate — Mr. John Randolph Tucker, of Virginia — is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States. Spies *v.* Illinois, 123 U.S. 131, 150. This definition is supported by reference to the history of the first ten Amendments to the Constitution, and of the amendments which followed the late Civil War.'

In the same case Mr. Justice Harlan, speaking for himself and Mr. Justice Brewer, said:

> "I fully concur with Mr. Justice Field that since the adoption of the Fourteenth Amendment no one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution, adopted by the convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States. The Constitution was ratified in the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union, Articles of Amendment would be submitted to the people, recognizing those essential rights of life, liberty, and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country. Among those rights is immunity from cruel and unusual punishments, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgment by the State." 144 U.S. 370.

The question was left open in that case by the majority of the Court (144 U.S. 331), and has not been directly passed upon in any later case; while in Moore *v.* Missouri, 159 U.S. 673, this Court, upon a writ of error to the Supreme Court of Missouri, considered and decided the question whether a statute of that State had put the plaintiff in error twice in jeopardy. Whether immunity from double jeopardy is a privilege or immunity of a citizen of the United States must therefore be regarded at least as an open question.

The view for which we contend has been earnestly supported by a distinguished text-writer (Guthrie's Fourteenth Amendment, 58–65), who draws a strong argument from the views of the Re-

construction Committee. See the language of Senator Howard in presenting the amendment to the Senate:

> "Such [citing Corfield *v.* Coryell, 4 Wash. C.C. 371, 380] is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be, — for they are not and cannot be fully defined in their entire extent and precise nature, — to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution: such as the freedom of speech and the press; the right of the people peaceably to assemble and petition the government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments."
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> Cong. Globe, 39th Cong., 1st. Sess., pt. 3, pp. 2764–2765.
>
> Guthrie's Fourteenth Amendment, 60, 61.

> "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."
>
> Mr. Justice Miller in *ex parte* Bain, 121 U.S. 1, 12.

It follows that the right to be protected from double jeopardy, secured to the plaintiff in error as against the Federal government by the Fifth Amendment, is now guaranteed against the States by the Fourteenth Amendment. Even if the Fourteenth Amendment

does not go so far as to secure to citizens of the United States, as against the States, *all* the benefits of the first eight amendments, *e.g.*, those more particularly referring to procedure in the Courts of the United States, it must still be held to protect those fundamental and inherent rights which necessarily go with any system of government based on political liberty. It was of such a right that Mr. Justice Bradley said, in Boyd *v.* United States, 116 U.S. 616, 631, 632:

> "Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."
>
> (See also Counselman *v.* Hitchcock, 142 U.S. 547, 581.)

Foremost among these fundamental rights which have come down to us as a part of our political atmosphere ("ancient right unnoticed as the breath we draw") is the immunity from double jeopardy.

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. . . . These salutary principles of the common law have, to some extent, been embodied in the constitutions of the several States and of the United States. . . . It is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection. . . . Judge McLean said, in a dissenting opinion, that 'the exercise of such a power by the States would, in effect, be a violation of the Constitution of the United States and of the respective States. They all provide against a second punishment for the same act.' 'It is contrary,' said he, 'to the nature and

genius of our government to permit an individual to be twice punished for the same act.'"

Ex parte Lange, 18 Wall. 163, 168, 170, 172.

If it were within the power of a State to repeal such fundamental and salutary principles of the common law and provide for double jeopardy, the guarantees of the Fourteenth Amendment would be of slight value, and that Amendment would altogether fail to accomplish the special objects which were most strongly before the minds of its framers. (See the able argument of Mr. John Randolph Tucker in Spies *v.* Illinois, 123 U.S. pp. 149, 150.) Where, as in Massachusetts, the constitution of the State has no provision against double jeopardy, the power of the Legislature in this particular is unlimited unless controlled by the Fourteenth Amendment; and the test of so dangerous a power must be the possibility and not the probability of its exercise.

II.

A SENTENCE WHICH PUTS A PRISONER A SECOND TIME IN JEOPARDY DEPRIVES HIM OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

The provisions of the Fourteenth Amendment with reference to "due process of law" do not limit the power of the States to regulate their procedure as they see fit, so long as the established principles underlying the administration of justice, either civil or criminal, are not infringed on, and the fundamental rights of citizens are not invaded. It does, however, require something more than due formality in judicial proceedings. It imposes on this court the necessity of examining the *substance* of the action of State legislatures and courts, to see whether there has been, beneath the form, any such violation of essential principles.

This has been recognized by repeated decisions of this Court.

Thus in Hodgson *v.* Vermont, 168 U.S. 262, 272, the Court, speaking through Mr. Justice Shiras, said:

> "We concede the proposition so earnestly urged on behalf of the plaintiff in error that by the Fourteenth Amendment it is made the right and the consequent duty of this Court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a State it is sought to arbitrarily deprive any person of his life, liberty, or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or entitled by the mere fact that the judgment complained of was reached by proceedings in a State court in pursuance of the provision of a State statute."

So in Brown *v.* New Jersey, 175 U.S. 172, 175, Mr. Justice Brewer, for the Court, said:

> "The State has full control over the procedure in its courts both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of *fundamental rights* or conflict with specific and applicable provisions of the Federal Constitution."

Accordingly, in that case the Court found it necessary to consider whether compelling a prisoner to submit to trial by a "struck jury" was such a denial.

The doctrine is comprehensively considered and applied in Chicago, Burlington, & Quincy R.R. *v.* Chicago, 166 U.S. 226. The plaintiff's sole contention in that case was that the judgment of the State Court awarding it but one dollar as compensation for the opening of a public street across its tracks deprived it of property without due process of law. The State constitution made provision for due compensation so that the action of the *court* alone was in question, but as this Court observes:

> "The prohibitions of the amendment refer to all the instrumentalities of the State, to itslegislative, executive, and judicial authorities." . . . "Nor is the contention that the

> railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in Court, and was admitted to make a defence." . . . "In determining what is due process of law regard must be had to substance, not to form." 166 U.S. 233, 234, 235.

So the Court felt obliged to inquire whether compensation for property taken for a public use was an essential feature of due process of law, and determined that it was.

The applicability of this decision to the present case is clear and direct. The Federal constitution contains no express inhibition on the States preventing their taking property without compensation. Compensation is a part of the "due process of law,' only because it has so long been recognized as "founded in natural equity, and is laid down by jurists as a principle of universal law." (166 U.S. 236.) And this is no less true of the principle that a man should not be twice punished for one offence. Even the right to private property is second to that of personal liberty, as is recognized by the Court in its quotation (166 U.S. 236) from Broom on Constitutional Law:

> "Next in degree to the right of personal liberty is that of enjoying private property without undue interference or molestation."

In U.S. *v.* Gibert, 2 Sumner, 19, 38, 60, Mr. Justice Story said of the right to be free from double jeopardy:

> "The privilege thus secured is but a constitutional recognition of an old and well-established maxim of the common law." "The existence of this maxim as a fundamental rule of the common law in the administration of criminal justice may be constantly found recognized by elementary writers and courts of justice from a very early period down to the present time." "I deem it a privilege of inestimable value to the citizen."

And the same views have been clearly and forcibly expressed by this Court in *ex parte* Lange. (See page 20 above.)

A State statute enacting that convicts who had served out their sentence should be subject, at the pleasure of the court, to a further sentence for the same offence would therefore violate the Fourteenth Amendment, no matter what its provisions with reference to procedure. And if a State cannot by legislative enactment deprive citizens of the United States of their liberty in such a way, no more can it do so by the action of its courts without the aid of a statute.

Particularly is this true where, as in the present case, the first sentence was approved by the highest court of the State, and the second was rendered possible only by the reversal of the former decision. In such a case the later decision has all the practical evils of an *ex post facto* law; and the express prohibition of the Constitution (Art. I., sect. 9) with reference to such laws is escaped only because the language of that section is limited to action by the legislature. The action of the court in the present case thus not only violated sacred and long-established rights touching the liberty of the citizen, but also accomplished this result in a manner directly contrary to the spirit of the Constitution. Such action cannot be due process of law.

Respectfully submitted,

BRANDEIS, DUNBAR & NUTTER,
For the Plaintiff in Error.

LOUIS D. BRANDEIS,
EZRA R. THAYER,
EDWARD F. McCLENNEN,
Of Counsel.